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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PATRICIO AHUMADA,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit applies an incorrect legal standard to determine whether an immigration judge's conduct during an immigration hearing has violated an alien's constitutional right to due process?

PARTIES TO THE PROCEEDINGS

Petitioner is Patricio Ahumada. Respondent is the Attorney General of the United States. [1]

[1] At the time this petition is filed, the post of Attorney General is vacant subsequent to the resignation of Alberto Gonzales who previously held the post.

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PETITION FOR A WRIT OF CERTIORARI

Patricio Ahumada, a non-citizen of the United States of America, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinions of the court of appeals *(App., infra, A1-A6)* are unreported. The decisions of the Board of Immigration Appeals *(App., infra, A7-A8)* and the immigration judge *(App., infra, A9-A31)* are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 2007. *(App. A4).* The decision of the Court of Appeals denying rehearing was entered on Jun 26, 2007. *(App. A32).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act ("INA") 8 U.S.C. § 1229a establishes general procedures to be followed during removal proceedings. Among them:

8 U.S.C. §1229a(b)(1) grants an immigration judge authority to: "administer oaths, receive

evidence, and interrogate, examine, and cross-examine the alien and any witnesses."

8 U.S.C. § 1229a(b)(4) provides an alien with certain rights in removal proceedings. "The alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . . .

None of these sub-sections specifically defines the due-process rights afforded an alien in removal proceedings.

STATEMENT OF THE CASE

Applying Ninth Circuit "due process" law, the panel held that Ahumada was not prevented from reasonably presenting his case to the immigration court, nor were his rights to due process violated. The rules applied by the Ninth Circuit and other courts to determine whether an immigration judge's conduct at a removal hearing denies the alien a fair and impartial hearing are insufficient to protect the alien's constitutional right to due process. Certiorari should be granted to explicate the full range of due process rights afforded an immigrant in immigration proceedings and the standards to be applied in evaluating these claims.

1. Due Process in the Immigration Courts.

On January 9, 2006, Attorney General Alberto Gonzales sent a letter to all immigration judges acknowledging the well-known and much publicized

problems that occur in some immigration proceedings and explaining his decision to conduct a comprehensive review of their work. The review followed what had become well known in the circuit courts and the Board of Immigration Appeals: that some Immigration Judges' work was falling well below the standard required, and that the manner in which some of these courts were run was seriously deficient. Over the past decade many immigrants have filed petitions and appeals alleging bias, partiality, aggressive and demeaning attitudes on the part of the immigration judges, and other acts which violated immigrants' rights to a full and fair hearing on the merits with an impartial adjudicator.

In turn, the circuit courts have chastised immigration judges on numerous occasions. Noting that its criticisms of both the Board of Immigration Appeals and Immigration Judges have "frequently been severe," the Seventh Circuit stated:

> The tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice. ... [I]t cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective

> enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts ... [T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them.
>
> *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir., 2005).

The Seventh Circuit is not alone in its criticisms, as a number of other courts also have expressed concern over the increasing number of below-standard decisions of Immigration Judges that they are now forced to review. *See eg. Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2005) [IJ's premature decision to halt proceedings based on a flawed frivolousness finding was premature and resulted in a denial of due process]; *Alarcon-Chavez v. Gonzales*, (403 F.3d 343 5th Cir. 2005) [Arbitrary exercise of judicial fiat at the expense of a powerless person to hold that the petitioner failed to appear, where his 20-minute tardiness was only "slight," and the IJ had just left the bench, was still nearby and the arrival was still within business hours. Judges are appointed, not anointed.]; *Ahmed v. Gonzales*, 398 F.3d 722 (6th Cir. 2005) [IJ's mischaracterization of testimony was biased and deprived petitioners of due process.]; *Huang v. Gonzales*, 403 F.3d 945 (7th Cir. 2005) [IJ's adverse credibility determination relied too heavily on personal opinion and information outside of the record, IJ aggressively questioned petitioner and did not allow a response, and the corroboration

requested by the IJ was unreasonable.]; *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005) [IJ's treatment of the petitioner during the hearing was arbitrary and capricious, making highly caustic comments without substance.]

The Immigration Judge in this case, Judge Anna Ho, has been rebuked by the Ninth Circuit several times:

> In light of the foregoing, it is appropriate to echo the words of this court in *Paramasamy* and express a similar worry that "these passages demonstrate the IJ's 'predisposition to discredit' the testimony, rather than any lack of credibility on the part of the witnesses." 295 F.3d at 1051 (quoting *Garrovillas v. INS*, 156 F.3d 1010, 1015 (9th Cir.1998)). In *Paramasamy*, this court found that the IJ's adverse credibility finding was not supported by substantial evidence because, among other things, it relied upon "perceived inconsistencies not based on the evidence." *Paramasamy*, 295 F.3d at 1052. In this case, as in *Paramasamy*, "the facts as they appear in the record do not support the [IJ's] articulated basis for an adverse credibility determination." *Id.* That the IJ rebuked in *Paramasamy* is the same IJ who presided over Smolniakova's asylum hearing is a fact not lost on this court In fact, the IJ in this case, **Anna Ho**,

has been reversed by this court at least three times in the last year for reasons similar to those that compel our reversal here. Most recently, in *Zolotukhin v. Gonzales,* 417 F.3d 1073 (9th Cir.2005), we held that IJ Ho violated a Russian asylum applicant's due process right to a full and fair hearing because she "improperly prejudged the petitioner's case" and "excluded the testimony of several key witnesses." Just one year earlier, in *Rivera v. Ashcroft,* 387 F.3d 835, 842 (9th Cir.2004), *amended by* 394 F.3d 1129, 1135 (9th Cir.2005), we held that IJ Ho failed to "conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes in the petitioner's story." Moreover, in *Singh v. Gonzales,* 403 F.3d 1081, 1090 (9th Cir.2005), this court reversed IJ Ho's adverse credibility finding in part because her "focus on minutely disparate dates" in the asylum applicants' testimony regarding seven-year-old events reflected "a flawed approach to credibility determination." Given this line of cases, we cannot help but question whether this IJ has, at least in some instances, improper hostility towards asylum applicants who appear before her."

Smolniakova v. Gonzales, 422 F.3d 1037, 1048 (9th Cir. 2005).

Against this backdrop, Ahumada, the petitioner in this case, was placed into removal proceedings.

2. Factual Background.

Ahumada is a native and citizen of Chile who has continuously resided in the United States since 1974, when he was 16 years old. He acquired lawful permanent residence on April 1, 1978, through a petition filed by his United States citizen sister. Ahumada currently resides in Seattle, Washington, and has lived in Washington State since his arrival in the United States. Ahumada is married to Keren Zuniga with whom he has three United States citizen children, Brandon aged 1, Ashley aged 7 and Jonathon aged 9. *(App. A20).* Ahumada is a home-owner and has maintained continuous employment in this country. *(App. A21).* Ahumada has no close relatives in Chile; all of his immediate family reside in the United States and are United States citizens. *(App. A21).*

Mr. Ahumada was placed in removal proceedings on September 20, 1995, by the filing of an Order to Show Cause. The Service alleged that Mr. Ahumada was deportable for having been convicted of two crimes of moral turpitude: an August 6, 1979 misdemeanor theft charge, and a May 21, 1990 statutory rape conviction. On February 26, 1996, at his initial court appearance, Mr. Ahumada requested an immigration waiver pursuant to 212(c) of the Immigration and Nationality Act ("INA"). On January 13, 1997, the Service amended the charge against Mr. Ahumada to include an allegation that his statutory rape

conviction was an aggravated felony under the INA. (App. A9). Immigration Judge Anna Ho upheld the amended charge, pretermitted Ahumada's application for relief under 212(c), and ordered Ahumada deported. *(App. A10).*

After further litigation, the matter was remanded back to Immigration Judge Anna Ho for a hearing on Ahumada's application for 212(c) relief. That hearing was held on October 9, 2001. In a decision dated October 11, 2001, *(App. A9).* Immigration Judge Anna Ho denied Ahumada's application for 212(c) relief, based on an erroneous threshold standard of "extreme hardship" which is not applicable to this type of relief. *(App. A29-31).*

During the hearing on October 9, 2001, Immigration Judge Anna Ho displayed an open hostility for Ahumada based on the crime he had committed. Throughout the proceeding she appeared to be biased against Ahumada, and pre-judged the case and her decision prior to hearing all of the testimony and taking all of the evidence offered by Ahumada. She repeatedly interjected herself into the proceedings, often interrupting Ahumada's attorney's questioning, while increasingly taking on an adversarial role. This, despite her role as an impartial adjudicator and the Government being represented by competent counsel. It is clear that Immigration Judge Anna Ho did not like Mr. Ahumada or the fact that he had committed a crime against a child. Her mind made up, her decision was foreclosed before any testimony was ever heard.

3. The Decision of the Board of Immigration Appeals.

In a Per Curiam decision, the Board of Immigration Appeals ("BIA") affirmed the decision of Immigration Judge Anna Ho. *(App. A5).* It found that, except with regard to the immigration judge's reference to "extreme hardship," Ahumada failed to establish that he warranted a waiver under 212(c). The BIA further held that Ahumada was not denied due process of law, and noted that "he was able to fully present his case before the immigration judge." *Id.*

4. The Memorandum Decision of the Ninth Circuit Court of Appeals.

The Ninth Circuit upheld the BIA's decision with regard to Immigration Judge Anna Ho's use of an improper legal standard in denying his application for relief. The court, in reference to Ahumada's argument that he had been denied due process based upon Judge Ho's conduct during the removal hearing, stated that: "her conduct of Ahumada's deportation hearings, while unfortunate in some respects, did not prevent him from reasonably presenting his case or violate due process." *(App. A2).*

In a one page order the Ninth Circuit denied Mr. Ahumada's Petition for Panel Re-Hearing. *(App. A32).*

REASONS FOR GRANTING THE WRIT

The standards applied by the courts to determine whether an immigration judge's conduct at a removal hearing denies the alien a fair and impartial hearing are insufficient to protect the alien's constitutional right to due process. Certiorari should be granted to explicate the full range of due process rights afforded an immigrant in immigration proceedings and the standards to be applied in evaluating these claims.

A. There is a Problem

The problem of intemperate immigration judges who through their behavior, cloud our notions of a fundamentally fair hearing, can best be remedied by this court squarely addressing the issue. That it has not yet been addressed has allowed the problem to continue. While there might be many ways to fix this recurring problem, it is through the legitimacy provided by the decisions of the highest tribunal which will serve to protect the interests of those involved, the poor huddled masses.

While the executive must get its own house in order to be sure, it is only the federal courts which, by statute review the decisions of the immigration judges, which can render such noxious conduct illegitimate. In this we ask that the Court address this issue with a voice which will be heard in a way which, try as they might, cannot be conveyed by the circuits.

Several Circuits, have of course, tried to convey the extent of the problem. Judge Posner of the Seventh circuit, has been among the loudest

voices among the judges who review the immigration judges' decisions. His explanation of the matter in *Benslimane,* having been noted, we mention a recent case:

> The immigration judge failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand. In effect, he applied the discredited doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things), which Wigmore called "primitive psychology, and-in a characterization that we endorsed... an "absolutely false maxim of life." ...Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment.
>
> *Kadia v. Gonzales*, 2007 WL 2566015, at 3 (7th Cir. 2007).

Judge Fuentes of the Third Circuit has made a similar diagnosis of the extent of the problem. In *Wang v. Attorney General*, he condemned "a disturbing pattern of IJ misconduct," reporting that:

> Time and time again, we have cautioned immigration judges against

> making intemperate or humiliating remarks during immigration proceedings," and, "Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect." Judge Fuentes of the Third Circuit made such a diagnosis in Wang v. Attorney General, where he condemned "a disturbing pattern of IJ misconduct," reporting that, "Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings," and, "Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect." *Wang v. Attorney Gen.*, 423 F.3d 260, 267-68 (3d Cir. 2005) (reversing BIA affirmance of an expulsion order where an immigration judge had bullied, mocked, and humiliated an asylum-seeker whose wife had been forcibly sterilized in China).

Judge Fuentes then cited thirteen cases contributing to this pattern.

B. An Alien With Lawful Permanent Resident Status Has A Right To Constitutional Due Process In Removal Proceedings Under The Fifth Amendment.

While Congress has plenary power to control immigration, it has been established for more than a century that aliens in the United States are entitled under the Fifth Amendment to due process of law in removal proceedings. *Reno v. Flores,* 507 U.S. 292, 306, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); See *The Japanese Immigrant Case,* 189 U.S. 86, 100-101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903); *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). *See Wong Wing v. United States,* 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896).

This requirement applies not only to courts, but also to administrative agencies. *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill,* 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973).

C. A Right to Due Process Under the Fifth Amendment Provides for a Fair and Impartial Hearing.

The right to due process in administrative removal hearings is founded on fundamental fairness. A fair trial in a fair tribunal is a basic

requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the probability of unfairness. *In re Murchison* 349 U.S. 133, 136, 75 S.Ct. 623, 625 (U.S. 1955). As *Schweiker v. McClure,* 456 U.S. 188, 195, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982) recognized, it is well established that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." (*See also Marincas v. Lewis,* 92 F.3d 195, 204 (3d Cir.1996), describing the need for a neutral judge as one of the most basic due process protections). As judicial officers, Immigration Judges have a "responsibility to function as neutral and impartial arbiters" and "must assiduously refrain from becoming advocates for either party." *Aguilar-Solis v. INS,* 168 F.3d 565, 569 (1st Cir.1999).

In attempting to make out a claim of unconstitutional bias, a plaintiff must "overcome a presumption of honesty and integrity" on the part of decision-makers. *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). The plaintiff must show that the adjudicator "has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v. Lungren,* 967 F.2d 329, 333 (9th Cir.1992) (quoting *Partington v. Gedan,* 880 F.2d 116, 135 (9th Cir.1989) (Reinhardt, J. concurring and dissenting)), *cert. denied,* 506 U.S. 1054, 113 S.Ct. 979, 122 L.Ed.2d 133 (1993).

D. The Rules Applied By the Circuits

When reviewing whether an alien was denied a fair hearing by the conduct of an immigration

judge, those circuits which have addressed the issue look to see whether the alien was denied an opportunity to present his case. If the immigration judge's actions were such that the alien was directly prevented from presenting evidence or testimony, then due process violations are found if prejudice is established.

However, rather than focusing on bias and impartiality which affects the decision, this standard focuses on improper procedural issues. Thus, according to this standard, it is the denial of procedural due process which defines an unfair hearing. The substantive right to a fair decision that was made through a process devoid of prejudgment is mostly ignored. Thus it is active interference with establishing a case, rather than statements which indicate premature judgment which establish the claim. In *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000), it was the judge's denial of testimony which established bias:

> when testimony began, the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel. The IJ refused to let Colmenar testify about who he believed had thrown the Molotov cocktail at him, despite the circumstantial evidence linking the incident to the threatening letter. He also refused to let Colmenar testify about anything that was included in his written application. This prevented Colmenar from elaborating on the fears

> he had expressed in his application. It also frustrated his attorney to the point that he was forced to end his examination of Colmenar after only a handful of questions. *Id.* *See also* *Ramirez-Durazo v. INS*, 794 F.2d 491, 500 (9th Cir.1986) (quoting *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir.1986).

The First, Third, and Seventh Circuits also apply essentially the same rule. In *Bernal-Vallejo v. I.N.S.*, 195 F.3d 56, 63 (1st Cir. 1999), the First Circuit held that "this court has recognized that there is a due process violation if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Id.* In addition to the requirement that the conduct must prevent the alien from presenting her case, in *Muhanna v. Gonzales*, 399 F.3d 582, 587 (3rd Cir. 2005), the 3rd Circuit established a traditional due process analysis for removal proceedings: "An alien: (1) is entitled to factfinding based on a record produced before the decisionmaker and disclosed to him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to an individualized determination of his or her interests."

The Seventh circuit has gotten slightly more involved in the analysis.

> The IJ does not violate due process by focusing the hearing in this manner to focus the proceedings and exclude relevant evidence. *Id.* "In the second type of situation, by contrast, the

> immigration judge violates due process by barring complete chunks of oral testimony that would support the applicant's claims. This categorization, while helpful, is imprecise and the appropriate characterization of the IJ's action is, in essence, a matter of degree. In the end, we must determine whether, given the totality of circumstances, the petitioner had a full and fair opportunity to put on her case.
>
> *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005).

The Eighth Circuit, in contrast, has put it rather vaguely: "To demonstrate a violation of due process, an alien must demonstrate both a fundamental procedural error and that the error resulted in prejudice." *Al Khouri v. Ashcroft*, 362 F.3d 461, 466 (8th Cir. 2004), *citing Lopez v. Heinauer*, 332 F.3d 507, 512 (8th Cir. 2003). The requirement for prejudice, however, is somewhere in the middle of the extremes. "Actual prejudice exists where defects in the deportation proceedings *may well have* resulted in a deportation that would not otherwise have occurred." *Id.*

The analysis in other circuits tends to focus more on whether a high standard of prejudice has been established. In the Sixth Circuit, a due process violation is found if it is proven that the judge's actions in preventing testimony or otherwise actively interfering with presenting the case would have changed the outcome. *Mapouya v. Gonzales*, 487 F.3d 396, 416 (6th Cir. 2007). Likewise the Fifth and

Eleventh Circuits. To prevail on a due process challenge to a deportation proceeding, "an alien must show substantial prejudice." *Ka Fung Chan v. INS*, 634 F.2d 248, 258 (5th Cir.1981). "[H]e must establish that... the outcome would have been different." *Ibrahim v. U.S. I.N.S.*, 821 F.2d 1547, 1550 (11th Cir.1987).

E. The Mere Right To Present One's Case Does Not Ensure That The Decision Is Fair And Impartial.

While the right to present one's case is of course a factor to determine whether a hearing is fair, it cannot be used as the baseline rule to determine whether a judge's conduct during the hearing rendered the hearing unfair. For example, a judge may allow testimony, but may, by her questions, guide it to where it would not have gone, or by intemperate remarks, prevent it from going where it would have. A judge may also display an outward bias which taints the entire proceedings.

We assert that the rule regarding due process should be more expansive. As a general rule, the hearing must appear to be fair. Statements which indicate the issue has been prejudged before the hearing has completed, may by themselves provide prima facie evidence that the matter was prejudged. The more the judge takes on a prosecutorial role, the less the judge appears a neutral adjudicator. While these factors are not exclusive, they are indicative of the types of things which may indicate that the judge is not impartial.

F. The Supreme Court Is The Most Suitable Forum For Reconciling This Issue.

The sole question presented in this petition: what shall be the rule applied by the lower courts to determine if an immigration judge's conduct during a hearing infringes on due process, is necessarily an issue for this court to resolve.

Congress through statute, has established the immigration courts, and through its purse, has funded them. The judiciary, in its most natural and traditional role, is left with reviewing the decisions which issue there-from and ensuring that these decisions conform to the legal standards mandated by the constitution. Indeed, there is no inquiry better suited to the Court than determining the appropriate rule of law to be applied by the inferior courts in determining the constitutionality of a law or a legal process, such as the one at issue.

The Attorney General cannot resolve this, for the executive is constrained by the limitations of its regulatory authority which is constrained by statutes provided by Congress. Regulations and statutes can and must consider the body of constitutional law, of course, but they cannot define it, for it is the law of the constitution which defines them.

For many years, the Court has maintained that deportation proceedings shall comport with due process. In this, *stare decisis* holds sway. The lower courts, so charged, have thus gone forth and applied their views as to the nature of due process in these proceedings, often, with mixed results. While there is but one set of agency regulations, there are many circuits applying the fundamental constitutional

requirement for due process and they are yet of one mind on how to define a fair hearing. Thus, the executive is necessarily constrained in regulating away the problem of misconduct during a hearing with a regulation, not by the narrowness of the judicial interpretations, but rather by their subtle inconsistency. It is this nature of agency adjudication and rulemaking which requires a background of unified judicial rules of constitutional law, itself a fundamental necessity for proper functioning of the executive.

In contrast, the need for absolutely consistent interpretation is less dire when the adjudications themselves begin and end in the traditional courts of law. The courts themselves simply apply the body of law in their particular jurisdiction. Should, the law be unclear, it is immediately resolved by the next level of appeal, and should that not suffice, to the next. However, the problems created by national regulations which mandate procedures for executive employees which have been held invalid in one circuit, rarely appear for the courts fix the mess.

The common perception that the law is applied free of bias and impartially is the most fundamental necessity if Law is to exist. We acknowledge that an issue such as this may be seen as a chastisement of the agency, but such a view misses the mark for in no way can it be overreaching. When it is judges judging judges, the implication is a much more profound and positive thing. For what really is at stake is something that while frequently addressed in the margins and is often lost from the view on the bench: but is readily apparent from those sitting elsewhere: fair judgments require fair judges.

Thus, if a perception exists that the judges are anything but fair, it is the job of the Court to eviscerate that notion. Granting certiorari and holding forth on this issue, is how we propose it should be done.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
MAR 13 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

PATRICIO AHUMADA,
Petitioner,

v.

No. 05-75003
Agency No. A20-954-215
MEMORANDUM*

ALBERTO R. GONZALES, Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted March 5, 2007**
Seattle, Washington

Before: O'SCANNLAIN, TASHIMA, and BERZON,

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*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Circuit Judges.

Patricio Ahumada, a native and citizen of Chile, petitions for review of an order of the Board of Immigration Appeals ("BIA") dismissing his appeal from an immigration judge's ("IJ") decision denying him a waiver under former INA § 212(c). We dismiss the petition for review in part and deny it in part.

To the extent that Ahumada challenges the agency's denial of a § 212(c) waiver on the merits, we lack jurisdiction to review this claim. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

Ahumada's contention that the BIA should have remanded his case because the IJ applied an incorrect legal standard is unpersuasive. The BIA acted properly in adopting and affirming the IJ's decision "[e]xcept with regard to her references to 'extreme hardship.'" *See Elnager v. INS*, 930 F.2d 784, 787 (9th Cir. 1991). ("[T]he BIA has the power to make independent determinations regarding the legal sufficiency of evidence .... [and] has the power to apply the correct standard regardless of the law applied by the immigration judge."). In addition, Ahumada is incorrect in asserting that the BIA entered an initial deportation order in this case.

We have reviewed the record of proceedings before IJ Anna Ho and conclude that her conduct of Ahumada's deportation hearings, while unfortunate in some respects, did not prevent him from reasonably presenting his case or violate due process. *See Melkonian v. Ashcroft* , 320 F.3d 1061,

1072 (9th Cir. 2003) ("The IJ did question Melkonian aggressively and sometimes harshly. Nonetheless, this does not, on the facts of this case, rise to the level of a due process violation."); *cf. Colmenar v. INS*, 210 F.3d 967, 971-72 (9th Cir. 2000) (concluding that due process was violated because the IJ, inter alia, "forced [counsel] to end his examination of Colmenar after only a handful of questions").

PETITION FOR REVIEW DISMISSED in part; DENIED in part.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIO AHUMADA,
Petitioner,

v.

No. 05-75003
Agency No. A20-954-215
JUDGMENT

ALBERTO R. GONZALES, Attorney General,
Respondent.

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/s/

Upon Petition for Review of a Decision of the Board of Immigration Appeals

This cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the petition for review of the said decision of the Board of Immigration Appeals in this cause be, and hereby is DISMISSED in part; DENIED in part.

Filed and entered 03/13/07

[JUSTICE
DEPT. SEAL]

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Rios III, Manuel F., Esquire
811 First Avenue
Suite 200
Seattle, WA 98104-0000

Office of the District
Counsel/SE
1000 Second Avenue
Suite 2900
Seattle, WA 98104

Name: AHUMADA, PATRICIO R. A20-954-215

Date of this notice: 01/24/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/

Frank Krider
Chief Clerk

[DATE STAMP]
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Enclosure

Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A20 954 215 - Seattle Date: JAN 24 2005

In re: AHUMADA, PATRICIO R.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rios III, Manuel F., Esquire

ORDER:

PER CURIAM. Except with regard to her references to "extreme hardship," we adopt and affirm the decision of the Immigration Judge insofar as she concluded that the respondent failed to establish that he warranted a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), in the exercise of discretion (IJ. at 21-22). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). Even considering the

undeniable hardship the respondent's family members will face as a result of his removal from the United States, particularly considering the seriousness of his statutory rape conviction, we are not persuaded that a grant of relief is in the best interests of this country. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). Finally, we do not find that the respondent's hearing deprived him of due process, and note that he was able to fully present his case before the Immigration Judge. Accordingly, the appeal is dismissed.

/s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

IN THE MATTER OF:

PATRICIO R. AHUMADA,
Respondent

Date: October 11, 2001
File No.: A 20 954 215
IN REMOVAL PROCEEDINGS

Charges: Section 237(a) (2) (A) (iii) of the Immigration and Nationality Act (Act), as amended, in that you have been convicted of an aggravated felony as defined in section 101(a) (43) (F) of the Act, a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment was at least one year.

Application: 212(c) waiver pursuant to *Magana-Pizano*

ON BEHALF OF RESPONDENT:

Michael Johnson-Ortiz, Esq.
605 First Ave., Ste. 350
Seattle, WA 98104

ON BEHALF OF INS:

Robert F. Peck, Esq.
1000 2nd Ave., Ste. 2900
Seattle, WA 98104

ORDER OF THE IMMIGRATION JUDGE

On March 31, 1997, this court issued a decision pretermitting the respondent's application for a 212(c) waiver. On December 26, 2000, the Board of Immigration Appeals reopened the matter on motion of the respondent, without opposition from the Immigration and Naturalization Service. (Remand Exhibit 1)

The respondent was convicted of an aggravated felony, and the motion to reopen is specifically on the issue of a waiver of deportability under 212(c) pursuant to *Magana-Pizano v. INS*, 200 F.3d 1133 (9th Cir. 1999).

On September 27, 2001, the respondent filed his Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, together with 215 pages of supporting documents, which has been accepted as Remand Exhibit 2. On September 28, 2001, the respondent filed a supplemental pre-hearing statement, a total of 36 pages, which has been admitted as Remand Exhibit 2A. On October 9, 2001, the respondent filed second supplemental prehearing statement, a total of 11 pages, which has been admitted as Remand Exhibit 2B. On the same date, the respondent filed a third supplemental

pre-hearing statement, a total of 8 pages, which has been admitted as Remand Exhibit 2C.

After the first merits' hearing, the Service submitted the entire transcript of the respondent's criminal proceedings, which has been admitted as Exhibit 3.

STATEMENT OF LAW
MAGANA-PIZANO CASE

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA). Section 440(d) of AEDPA provided that an "alien who is deportable by reason of having committed any criminal offense covered in section 241 (a) (2) (A) (iii), (B), (C), or (D), or any offense covered by section 241(a) (2) (A) (ii) for which both predicate offenses are covered by section 241(a) (2) (A) (i)" is not eligible for a section 212(c) waiver. Thus, section 440 (d) amended INA section 212(c) to eliminate discretionary relief for an alien convicted of, inter alia, an aggravated felony.

In a recent decision, however, the United States Court of Appeals for the Ninth Circuit held that the restrictions on section 212(c) relief added by AEDPA section 440(d) were not intended to apply to aliens whose deportation proceedings were pending when AEDPA was enacted. *Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999). Thus, those *aliens whose deportation proceedings were pending on or before April 24, 1996* (the date of AEDPA's

enactment) may apply for section 212(c) relief. [Emphasis Added]

The Court also discussed whether the retroactive application of AEDPA section 440(d) could apply to proceedings where the alien, although not in deportation proceedings until after the law's effective date, *had pled guilty to a crime before AEDPA's enactment. Id.* at 612-613. [Emphasis Added] The Court held that section 440(d) should not be applied in such deportation proceedings – even though the proceeding did not begin until after AEDPA's enactment – if the alien could "*demonstrate that they entered guilty or nolo contendere pleas in reliance upon the relief afforded by INA §212(c)".* [Emphasis added] *Id.* at 613.

The proceedings in *Magana-Pizano* were initiated against the alien before IIRIRA's [1] general effective date of April 1, 1997 and the final deportation or exclusion order was filed after October 30, 1996. *Magana-Pizano* at 607. The proceedings were therefore governed by IIRIRA's transitional rules.

WAIVER OF INADMISSIBILITY UNDER 212(c)

An alien who is inadmissible under this section may seek a waiver of inadmissibility under

---

[1]Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat. 3656 (IIRIRA).

section 212 (h) of the Act. Section 212(c) may be used to waive inadmissibility which would otherwise preclude adjustment of status. *See Osuchukwu v. INS,* 744 F.2d 1136, 1139 (5th Cir. 1984); *Matter of Goldeshtein,* 20 I&N Dec. 382 (BIA 1991), *rev'd on other grounds,* 8 F.3d 645 (9th Cir. 1993); *Matter of Parodi, supra; Matter of Sanchez,* 17 I&N Dec. 218 (BIA 1980); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968).

Section 212(c) is a waiver of criminal grounds of excludability at the time of the alien's adjustment. *See Matter of Balao,* 20 I&N Dec. 440 (BIA 1992); *Matter of Sanchez,* 17 I&N Dec. 218 (BIA 1980); *Matter of Parodi,* 17 I&N Dec. 608 (BIA 1980.

The respondent has the burden of establishing that a grant of a waiver of inadmissibility is warranted in the exercise of discretion under section 212(c) (1) (B) of the Immigration and Nationality Act. The Immigration Judge must balance the adverse factors evidencing respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf. The Court then determines whether the grant of relief in the exercise of discretion appears to be in the best interests of this country.

Once respondent has established extreme hardship and eligibility for section 212 (c) relief, it does not create any entitlement to that relief. Establishing extreme hardship is but one favorable discretionary factor to be considered.

The respondent must bring forward equities to establish that he merits a favorable exercise of administrative discretion under section 212(c). The exercise of such discretion depends on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional favorable evidence.

If the respondent takes responsibility and shows remorse for his criminal behavior, it constitutes some evidence of rehabilitation. Although the lack of persuasive evidence of rehabilitation may not in itself be an adverse factor, the absence of this equity in his favor may ultimately be determinative in a given case concerning the exercise of discretion under section 212(c) of the Act. This is especially true in cases where an alien has engaged in serious misconduct and there are questions whether the alien will revert to criminal behavior.

The Respondent needs to first demonstrate that his removal would result in extreme hardship to the relative who is petitioning for him. *See Matter of Alarcon,* 20 I&N Dec. 557 (BIA 1992).

The burden is on the respondent to establish that a grant of a waiver of inadmissibility under section 212(c) of the Act is warranted in the exercise of discretion. *See Matter of Fernandez,* 14 I&N Dec. 24 (BIA 1972). This has been held to be the case for other waivers of inadmissibility. *See Matter of Marin,* 16 I&N Dec. 581 (BIA 1978) (section 212(c)

waiver).

The Immigration Judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *See Id.*

Where there are adverse factors, favorable factors such as family ties, hardship, length of residence in the United States, etc. will be considered as countervailing factors meriting a favorable exercise of discretion.

A waiver of inadmissibility under 212(c) involves at least one adverse consideration; specifically, if the criminal conviction or activity constituted the ground of exclusion sought to be waived. *See Matter of Marin, supra*, at 585. Thus, there can be no presumption that relief is warranted in the exercise of discretion. Further, the criminal conviction or activity would usually be more severe than any adverse factor present in the application for adjustment of status, presuming admissibility and general eligibility for adjustment of status.

Establishing extreme hardship and eligibility for section 212 (c) relief does not create any entitlement to that relief. Once extreme hardship is established, it is but one favorable discretionary factor to be considered.

An application for discretionary relief, including a waiver under section 212(c) and 212(h) may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. *Matter of Goldeshtein,* 20 I&N Dec. 382 (BIA 1991); *see also Silva v. Carter,* 326 F.2d 315, 320 (9th Cir. 1963); *cert. denied,* 377 U.S. 917 (1964).

In evaluating whether section 212(c) relief is warranted in the exercise of discretion, the factors adverse to the respondent include the nature and circumstances of the exclusion ground.

The presence of additional significant violations of this country's immigration laws must also be considered. If there is a criminal record, then the nature, recency and seriousness of the criminal record must also be considered and analyzed. Furthermore, the presence of other evidence indicative of the respondent's bad character or undesirability as a permanent resident in this country is important. *See Matter of Marin, supra,* and cases cited therein.

Favorable considerations includes family ties in the United States, length of residence in this country, evidence of hardship to alien and family if he is excluded and removed, history of stable employment, and service in this country's Armed Forces. The existence of property or business ties, evidence of value and service to the community are to be considered. If there is a criminal record, evidence of genuine rehabilitation is important. If there is any other evidence of the alien's good moral

character, that should also be considered.

The adverse and favorable equities are to be weighed and balanced. The alien's history of employment should be evaluated by its length. If there is a period of residency marked by a term of imprisonment, this diminishes the significance of the period of residency. *See generally Douglas v. INS,* 28 F.2d 241 (2d Cir. 1994) (residency marked by criminal activity).

The respondent has the burden of establishing that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. The Immigration Judge must balance the adverse factors evidencing Respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf. The Court then determines whether the grant of relief in the exercise of discretion appears to be in the best interests of this country.

On October 1, 2001, the following individuals testified as follows:

TESTIMONY OF PATRICIO R. AHUMADA

He was the boyfriend of Josef Elvig's mother, Donna Elvig. At the time he met Donna, he was about 22 to 25 years old. He met Donna from 1981 until 1986. At first they were boyfriend and girlfriend, then lived together. After they knew each other for a couple of years, she left him and so their relationship returned to boyfriend and girlfriend.

He was found guilty for the two counts. According to them, he did terrible things to Josef. He put his penis in Josef's mouth and a rubber in Josef's bottom. He never told this to his family. It was not fun, nor did it excite him. He is unsure why he did it. He found out he probably needs some help. He has been out since 1995. He has not sought any professional help, because he believes sometimes he needs help and sometimes he doesn't.

When he did this to Josef, Josef's mother was with her aunt. The mother had Josef in his care and this is what he did to Josef. He told his wife and sister. He told them he feels guilty, because he did something really terrible at that time. He did not tell his sister about what he did to Josef.

He did not seek any help, because he did not admit his guilt. He did this in revenge of Josef's mother, his girlfriend. He was angry at the mother and he sexually abused her son. He is unsure what Josef's life is like. He thinks Josef probably suffered trauma as a result of his actions.

Since 1995, he has been working. He worked with the Church. He did not tell the Priest of his Church the entire truth. He told the Priest he was accused of molesting his stepson. He told the Priest that he is not guilty. He is a Protestant. The punishment for lying to a Priest in his Church is that one would not get eternal life. The Priest needs to pray for him to get well. He lived in a lie for six years.

On continued direct examination by the respondent's attorney:

He did not tell Mr. Johnson-Ortiz that he committed the crime. He did not commit the crime. He told the court that he committed the crime, because he feels that Mr. Johnson-Ortiz pressured him to say that so that the court's decision would be on his side.

When he was arrested, he was just coming from work. His ex-girlfriend had psychiatric problems due to the way she lived and due to drugs. He was trying to take the boy from the mother. That is why the aunt jumped in and also agreed with the charge that they put on him.

He did not have sex with Josef, nor any other children. He never had the intent nor the desire to have sex with young children. He fought his case before the Court from 1986 until 1990. He can't remember exactly the year it began.

When the jury trial found him guilty, he appealed his case. He lost the appeal. He fought the appeal for a couple of years. He spent 37 months in jail and was sentenced to 47 months. He got out early due to his good time. During the time of his incarceration, he did not have any problems. He had a lot of activities with the rest of the inmates.

After his release from jail, he went downtown Seattle to register. From there, he went to his parents' house and stayed there. Since leaving jail,

he did not have any specialized training. While he was in jail, he was taking blueprint reader in math and English and tutor for Spanish-speaking individuals.

He is married to Karen and has been married for five years. He met Karen in 1995. He knew Karen's brother-in-law who was trying to keep in touch with him. Karen's brother-in-law asked for his telephone number. Karen's brother-in-law called him and had him go there. He married Karen on September 7, 1996, in Bothell United Pentecostal Church. He had been a member of the Church since 1984, 1985.

He made up a description of the trial as to what he was charged for as to putting his penis in Josef's mouth. The truth is that he was found guilty by the Court and in himself, he is not guilty. The only contact he had with Josef was that when Josef was a baby, he changed his diaper and taught him how to go to the bathroom. He gave Josef a bath.

His mother also helped care for the child. His mother is here in the Courtroom today.

His first child is almost four years old. He cares for his child, bathes his child and changes diapers. He had no sexual contact with his child. His first child is Jonathan. His second child, Ashley, was born in 1999. He bathes Ashley and changes Ashley's diapers.

He assisted in the care of his nieces and

nephews. He babysat for his nieces and nephews and had no sexual contacts with them. He has eighteen or more nieces and nephews and has grand nephews and nieces.

He has no family members remaining in Chile. He has two brothers, Carlos and Jose. He has six sisters, Anita, Maria, Patricia, Flor, Andrea, and Lorena. All of his siblings have obtained lawful status in the United States, and some of them are citizens.

He owns a house located in Tukwila. He purchased his home one year ago. He is currently employed at Rainier Precision. He started working there in 1995. He provided a letter from his supervisor and owner, Wendy. He has known her for five years, as of 1995. He is a machine-operator.

He is a member of the Pentecostal Church. He was a member of the United Pentecostal Church. He also volunteered at Familia de Dios in South Seattle. He teaches Sunday School, and is a Sunday School Teacher, including Bible Studies, focused on the old and New Testament.

He told a lie in court today. His Christian learning tells him that it is a sin. He sinned today. He did not sin in 1987, 1988, 1989 and 1990. He did not commit a sin against Josef, nor against any other children.

He was falsely accused, because Donna did not get what she wanted. He terminated his

relationship with her. she used him money wise, and he was babysitting the little boy. Donna also used her mother. Donna called her many times from where she was, so he could pick up the little boy.

They (he and his mother) decided to take the little boy away from Donna and it did not work. Donna said for him to take the little boy, and he said Donna had to give him legal paper. The aunt found out and did not want that to happen. This is how everything started. He no longer has that letter now. He returned to Donna a week later to get custody of the child and Donna refused.

The letter from Donna said she was the mother of Josef and is giving full-custody to his step-father, Josef Ahumada. They are not related. They lived many places, including his parents' home.

Josef spent 6 to 7 days a month at his mother's home. All family members cared for the child. Other than his mother, his sister, Andrea, helped take care of the child. His entire family helped take care of the child.

The family was concerned with the child, because they knew the child was suffering with his mother. They (he, Josef and Donna) constantly got kicked out of apartments and thrown on the streets. When he gave money to Donna to pay rent, Donna spent it on different things. They were not living together as a family.

They lived together as a family in 1981 until

1983, and since then the relationship started going up and down. He continued to see her.

From 1981 until 1983, Josef spent time at his family's home when they visited his family and Josef spent the night. Everyone in his family cared for Josef from 1981 until 1983.

Starting 1984, Josef stayed six or seven days a month with his family. His mother cared for the child, because she was always home. One of his sisters, Andrea, was living with his mother and took care of Josef. He never spent time alone with Josef, besides putting him in bed and he goes to his own bed.

When he was living with Donna from 1981 until 1983, he spent time alone with Josef while Josef was in his car going to the store. From March, 1987, until March, 1988, he never spent time alone with Josef. He was accused of something, so he never spent time alone with Josef. He has no idea where Josef is now.

Donna never attempted to contact him. None of Donna's family tried to contact him. He is not aware if any members of his family had any contact with Josef or Donna. He is unsure, but believes there is a permanent restraining order that restrains him from seeing Josef.

When he has a chance on Wednesdays and Saturdays, he goes to the streets to preach the word with other brothers and families. He teaches Youth

Bible Studies. They are 16 to 21 years old. He never had any sexual contacts with these children. There are 4 children from 16 to 21 and 15 children from ages 8-12, and other little ones under 8. He has been doing this for about two years.

He is a registered sex offender. The entire Church knows about this. He is the brother-in-law of the pastor of the Church.

He has nothing waiting for him in Chile. It is a poor situation. He does not know how to start over if he is returned there. He lives in a town about one to two hours away by car from the capital. He has no relatives remaining in Chile. His wife is also from San Diego, Chile. He does not know if his wife's family would help him or not. He has met his in-laws.

If he had to return to Chile, he would not take his wife and children with him. There is no hope for Chile. You need to know people to have a fair living. He has not looked into job opportunities in Chile. His wife is a homemaker. His wife graduated from high school, and went to IT&T. He is not aware that his wife came out with any specialized training.

If he left his family here, he thinks his wife and children will have a very hard time. His wife and children will miss him very much.

He was arrested for third degree theft in 1979, and giving liquors to minors. He did not commit the theft. They were accusing him of stealing a bicycle

and 5 cents. He was not found guilty and did not plead guilty. They dropped the case. He did not give liquors to minors in 1979. Charges were filed, he was not found guilty, and the case was dismissed.

He has been arrested for sexually related offenses, the offenses mentioned in the indictment of seven different counts of various sexual misconducts. There were three different children involved.

One of the children is his niece, Jessica, (brother, Jose's child). Jose came to Court today. The other child is the niece, Heather, of his ex-girlfriend. The case went to trial, but not at the same time as Josef's case. They lost. He never had sexual contact with Jessica. Jessica is not here today. He does not know where Jessica is, but is in either Bremerton or Port Orchard. His brother has contact with Jessica.

Heather is the cousin of Josef Elvig. He took care of Heather just like other children. He did not babysit with Heather, nor spend time alone with her. He never had sexual intercourse with Heather. He was found not guilty, and the trial was not at the same time as Josef Elvig's trial

He has never been arrested for any other crimes. On cross-examination, he testified as follows:

He married his wife after he was placed in deportation proceedings. His first child was born in 1997, after he was ordered removed by the Immigration Court. He and his wife discussed their decision to have a child, even though he was at risk

from being deported from the United States.

His wife came to the United States in 1992 as a tourist. His wife was illegally present. He petitioned for his wife.

He has a sister named Danila Luengo. Danila is married to Mario Luengo, the same Mario Luengo, a counselor who wrote a letter on behalf of the Department of Corrections. When Mario wrote the letter in 2000, he was his brother-in-law, Exhibit 2B, page 8. His pastor is also his brother-in-law.

He was arrested

TESTIMONY OF OSCAR H. ROMERO, M.D.

The respondent said he was innocent of the charges. If the respondent did not tell the truth, he did not find that the respondent had any mental disorder. His report is only correct as to the information given to him by the respondent.

It is not necessary that the patient has a profile to make him have an ongoing problem. The information just provided to him would elicit the need to inquire into this area. His evaluation is comprehensive and complete in terms of the information he obtained, but incomplete.

Based on the information provided to him by the Court, his evaluation is inaccurate. He was arrested in August, 1979, for theft in the 3 rd degree. On September 10, 1979, he was sentenced and

convicted for a $50 fine. During that arrest, he was also charged with obstruction of an officer, and also given $50 fine. The third charge was supplying liquor to a minor for which he was given a $50 fine. He told his attorney that he had not been convicted, because he said the case was dropped. He admits that he was convicted of the three offenses.

He was held in detention for two to three hours wherein he was taken in for questioning as to abuse of his ex-girlfriend, domestic fights. He was not charged with domestic violence.

He was arrested for the statutory rape offenses, because Dorothy Crome, Josef Elvig's aunt, reported this. He testified at his trial. The victim, Josef Elvig, testified.

At the trial, Josef Elvig told the Jury that he did something really bad, that he stuck his penis in Josef's mouth, and that he rubbed his penis all around Josef. It is a little bit hard after so many years. Josef said that he put his penis in Josef's mouth and that Josef would move his head up and down. Josef said that after the act, Josef had semen in his mouth.

Josef said that he inserted something (the respondent's penis) into Josef's rectum. Josef said it was hard. Josef said that he touched Josef with it. He does not remember that Josef thrust something inside. Josef was examined physically and he believes no physical evidence was introduced. During the time of the incident, Josef was four or

five years old.

At the criminal trial, he said nothing. He maintains that he still did nothing.

On redirect examination, he testified as follows:

Josef's aunt is Dorothy Crum, the mother of Heather. He knew Dorothy. He had a good relationship with Dorothy. That changed when Dorothy learned that he planned on taking Josef away.

He never met Josef's father. As far as he knows Josef's father has never been involved in Josef's life. Before he met Donna, Josef had a father figure in his home. Josef did not tell him about Josef's other father figure. Josef was too young to know any difference.

Donna never told him how Josef was treated by his other father-figures. Donna told him that the other men bought Josef things to calm Josef down. He thinks they were doing those things to keep Josef outside the relationship. Josef would show him that Josef was "daddy's boy." Josef was confused. Josef was only eight months when he met Josef.

On recross examination, he testified as follows:

When Josef testified at the criminal hearing, he did not testify as to whether he used force to hold

him. Josef did not state whether he threatened him. Josef was about four or five years old at that time. When the acts occurred, Josef was four or five years old.

At a continued merits' hearing, the respondent submitted written declaration of his additional witnesses. The Service did not wish to cross-examine any of the witnesses, The written declarations have been admitted as Exhibits 2B and 2C. The Service also submitted the criminal trial transcripts as well as all of the reports in the criminal matter, which have been admitted as Exhibit 3.

ANALYSIS OF FACTS AND LAW

The respondent has not established the primary requirement for 212(c) relief, since he has not shown that his deportation would result in extreme hardship to his United States citizen parents and family who are being cared for by his other siblings while he spent most of the last few years in jail. Furthermore, the siblings of the respondent are providing the necessary emotional support for his parents.

The respondent is not remorseful for his conviction. The respondent denies vehemently that he was guilty of the offense for which he was convicted. The court finds that the respondent is not a credible witness, because he first gave the details of the abuse to the child who calls him "dad." Later, he contradicted himself and said he told a lie.

This court finds that either the respondent was telling the truth, which in that case, would be the reason he was convicted by a jury. Or, he was telling a lie, after swearing to tell the truth to this court, and he is not a credible witness for having admitted to a lie on the stand before this court.

The respondent has a supportive family, who have testified at his criminal trial essentially the same thing they wrote in their affidavits, but he was still convicted by the Jury. Most importantly, this court can only abide by the conviction records of the state court. The respondent has been convicted, denies his culpability, and therefore shows no remorse for his statutory rape of a five-year old boy.

Even if, assuming arguendo, the respondent met the threshold burden of establishing extreme hardship, which this Court does not so find, he is not deserving of a discretionary grant of the waiver. The respondent has been convicted of statutory rape of a five-year boy who called him "dad," the child of his girlfriend. The young child was subjected to abuse both by his mother and the respondent, and was determined to be believable by the jury. Therefore, considering the nature of the offense, the seriousness and severity of the offense, the ties to the community and the number of years the respondent has been in this country, the court will not use its discretion to grant this waiver.

There are no other issues before this Court, therefore, the Court issues the following order:

ORDER

IT IS HEREBY ORDERED that the 212(c) waiver be denied.

IT IS FURTHER ORDERED that the Respondent be removed to Chile as he designates and as charged in the Order to Show Cause.

/s/_____
ANNA HO
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
JUN 26 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

PATRICIO AHUMADA,
Petitioner,

v.

No. 05-75003
Agency No. A20-954-215
ORDER

ALBERTO R. GONZALES, Attorney General,
Respondent.

Before: O'SCANNLAIN, TASHIMA, and BERZON, Circuit Judges.

The petition for panel rehearing is denied.

[DATE STAMP]
RECEIVED
JUN 29 2007
/s/_____